CASE NO. 80-1430

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TED ENGLE, Superintendent,
Chilicothe Correctional Institute,
Petitioner,

v.

LINCOLN ISAAC,
Respondent.

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,

v.

KENNETH L. BELL,
Respondent.

TED ENGLE, Superintendent
Chilicothe Correctional Institute,
Petitioner,

v.

HOWARD HUGHES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioners

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OPINIONS BELOW

The panel decision of the United States Court Of Appeals For The Sixth Circuit in **Isaac v. Engle** is now reported at 646 F. 2d 1122 (6th Cir. 1980). The en banc decision in **Issac** is now reported at 646 F. 2d 1129 (6th Cir. 1980).

STATEMENT OF THE CASE

For present purposes the only additional statement of the case necessary is a clarification of the facts concerning the actual crimes presented in Hughes and Isaac's answer briefs on the merits. Unlike other courts which have dealt with similar burden shifting issues the appellate court below "presumed" prejudice and made no reference to the actual facts of the crime beyond the fact that self defense was in issue. See: **Myers v. State of Washington**, 646 F. 2d 355 (9th Cir. 1981). Having attempted to bolster this ruling of law which is challenged in these cases, it is at least incumbent that a balanced and accurate presentation be made.

An example is Hughes' assertion that the only other adults present testified as defense witnesses consistent with Hughes' testimony that he had acted in self defense. Hughes' brief, page 7. Minnie Jackson, one of the two adults referred to testified that prior to the shooting the victim was standing over by a coffee table talking to Marie Hubbard preparing to leave, that his hands were down at his sides, and that he was not moving toward Hughes. (Hughes Tr. 216-219). In addition, she testified that she did not see the second shot as she was running to the basement and kept on going. (Hughes Tr. 211). Roger Logan's (Bootsie) testimony was even more inconsistent with Hughes. Logan testified as follows:

Q. Okay. There came a point, I believe, when Lemuel Johnson stood up from this davenport (indicating) is that correct?

A. Yes. He got up and went to the door.

Q. All right. Then what's the next thing you saw and observed?

A. Well, after he stood there and listened to Marie and Howard bickering among themselves, he stood up and said, "Well, I ain't got but one thing to say," and started walking towards Howard.

Q. Then what happened?

A. Well, he extended one of his hands toward Howard, and Howard told him that he didn't – he wasn't going to shake like that, and backed away from him.

Q. Okay. Then what Happened?

A. Then when he took a couple more steps Howard pulled the gun and shot him.

Q. Did you hear Howard give any warnings to back off, keep away?

A. No. Howard didn't say anything to him.

Q. All right.

A. He just said he didn't shake that way.

Q. How many shots were there?

A. I heard two.

Q. And when the second shot was fired was Lemuel backing up or going forward towards Howard?

A. Well, when the first shot hit him I think he was fixing to fall.

Q. All right. And did he continue forward or did he back up?

A. He was falling away.

Q. All right. Now, would you describe for this Court and Jury how the shots were fired? In other words, was it a bang - - bang, or was it a bang - bang?

A. Well, the first shot was fired off and a second or two and the other one was fired.

(Hughes Tr. 230-232). In addition, Logan testified that he never saw the victim's hands in his pockets and that when he extended his hand it was open. (Hughes Tr. 233-238, 240). In fact, Logan so contradicted Hughes' version of events that defense counsel requested he be declared a hostile witness:

> Your honor, I'm declaring this man a hostile witness. He's testifying for the State.

(Hughes Tr. 235).

Hughes points out that petitioners have never contested that self defense was properly in issue. Having shot the victim in front of witnesses, that was the only defense Hughes had. But no witness backed up Hughes' version of the events and as demonstrated above his "Defense" witnesses were equally as helpful, if not more so, to the State. Upon consideration of the entire record and not just Hughes' testimony the state appellate court stated:

> Our examination of the testimony of the witnesses in this cause convinces us that the generosity of the jury finding the defendant guilty of the lesser included offense of voluntary manslaughter, as opposed to murder, is most difficult to understand.

(JA 53).

Isaac's version of the facts in his case is even more misleading. The statement is made in Isaac's brief, page 1, that:

> "Isaac claimed Engle, without provocation, sucker punched him first from behind and he acted in self defense. . . . The only witnesses to the first punch were Isaac and Engle. Mrs. Schob admitted upon cross examination, that she did not see the beginning of the fight."

The entire statement is erroneous. Engle claimed that Isaac sucker punched him from behind not the reverse. Isaac's testimony at trial was that he decided to go see him ex-wife at the bar where she worked, that "she cussed me out" and told him to leave. At that time Engle drove up, called him over, told him to leave his ex-wife alone, and took a swing at him which grazed

his right shoulder. At that time, Isaac hit him "three or four hard licks" with his bare fists knocking him to the ground. When he got back up, Isaac hit him "another two or three licks" and knocked him down again, at which time he didn't get up again. Isaac then left the scene. (Isaac Tr. 128-131). In an earlier statement to police, Isaac stated a similar version except that the first punch missed and did not graze him.

A similar misstatement is made with respect to the testimony of Isaac's ex-wife, Donna Schob. Schob testified as follows:

> A. . . .Mr. Engle pulled up right in front of his car and he got out. Mr. Engle got out and Mr. Isaac was already standing beside his car and so the next thing, I saw Mr. Isaac throw a punch at him. I knew something - he was trying to do something. I immediately came back in and called the police.
>
> Q. You saw Mr. Isaac throw a punch at Mr. Engle?
>
> A. At Mr. Engle.
>
> Q. And you saw Mr. Engle from the time he pulled up until the time he was struck?
>
> A. I saw him get out of his car. He pulled up in front of Mr. Isaac's car and got out of his car. In other words, you might say they were standing face to face.
>
> Q. . . . .

A. . . . .

Q. Were you able to observe them during this time?

A. Just as I said, I saw him throw the first punch, then I immediately ran back in and called the police.

Q. Did you at any time see Mr. Engle say or do anything prior to the time Mr. Isaac hit Mr. Engle?

A. No.

Q. Did he raise either of his hands or fists?

A. I did not see that.

(Isaac Tr. 21-22). Upon cross examination, defense counsel asked her a series of questions, some inaccurately premised as to time and place as to what she had seen from the window on the side of the building as opposed to the window in the door of the bar. Such questions resulted in the statement relied upon by Isaac that she admitted she did not see the first blow. Redirect examination however disclosed that such statement was not the testimony of Schob. (Isaac Tr. 51). Schob repeatedly testified on redirect and recross that she saw the incident entirely from the time Engle got out of his car until the first blow was struck. (Isaac Tr. 52-61, 65-66).

The record, of course, contains many conflicting versions of what occurred including whether Engle warned Isaac not to see his ex-wife or Isaac warned his ex-wife not to see Engle. Even taking Isaac's version at face value however the jury could rightfully have rejected self defense. According to Isaac's own testimony, he

knocked Engle to the ground twice by as many as seven "hard licks" in response to a grazing swing at his shoulder. The ultimate impact of whether this was self defense was evident to the jury from the nature of Engle's injuries - including a broken jaw, facial lacerations, and a mechanical brace to hold his face together.

REPLY ARGUMENT ON THE MERITS

A. FUTILITY OF OBJECTION

Petitioners have asserted that the Court of Appeals' analysis in these cases makes **Wainwright v. Sykes**, 433 U.S. 72 (1977), a nullity by removing any middle ground between ineffectiveness of counsel and cause in which counsel's actions will be binding upon his client. The answer briefs of respondents demonstrate that petitioners' perception is accurate.

The clearest statement of the dispute between the parties is evidenced by Isaac's brief at page 6:

> The duty of trial counsel is not to make new law, but to diligently find existing law and provide it to the court so it has the opportunity to correctly charge the jury as to the law to be applied in the case.

The response of Judge Poole, dissenting in **Meyers v. State of Washington**, *supra* at 363, 364 is answer enough:

> . . .it should be remembered that the boundaries of constitutional rights have historically been redefined, patient mete and meter, largely by the efforts of diligent and thoughtful attorneys who search for and raise "new", but logical

> and reasonable extensions of previously established, or at least suggested, doctrines. This is important to the values we place on competence in advocacy in the larger aim for fair trial. The majority, it seems to me, ignores or denigrates these fundamental aspects of our legal system by the suggestion that it is unreasonable to expect the defense to raise objections at trial that are thoughtful and creative, rather than mere rote recitations of horn-book legal principles. The majority also takes too limited a view of the comity interests involved in this situation. Unless the objection was truly so far ahead of its time that its conception would have been visionary, I think that the state trial court is entitled to an opportunity to consider it before it may provide the basis for reversal on habeas corpus. Foresight of this level does not, as the majority seems to fear, accrue only to legal prophesy; it hallmarks also the able defender.

While Isaac cites **State v. Williams**, 51 Ohio St. 2d 112 (1977) for the proposition that Ohio Cr. R. 30 presupposes the existence of an established ground for objection the holding of the case and the reference therein to the "true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error" establishes that Ohio Cr. R. 30 does not have the limited purpose ascribed to it by respondents.

Respondents have attempted to isolate two separate and independent components of futility - the lack of perception of the issue itself and secondly, if perceived, the lack of probable success of such issue if raised. What

respondents have not shown however is how such indicia are any different than any other indicia which determine whether to raise an issue. The failure to determine whether an issue exists or that if it exists, it will be successful are no less strategic than any other decision counsel is entrusted to make.

The present cases serve as prime examples. Isaac asserts that his counsel after diligently researching the issue concluded that no change in the law had occurred. That however underscores that the determination was strategic. While offering an explanation that such decision was reasonable in light of prior law, it does nothing to further the analysis that such explanation is justification as well.

The question of burden shifting is not new - the concept is of long standing origin. At the time of respondents' trials, the doctrine had been applied in many other state courts systems and in the federal system itself to self defense claims and other affirmative defenses. Moreover, a new statute was in effect, and this court's recent decision in **Mullaney v. Wilbur**, 421 U.S. 684 (1974) had been decided. To say that the issue was "visionary" as opposed to difficult is simply incorrect. Respondents have asserted on the merits that the **State v. Robinson**, 47 Ohio St. 2d 103 (1976) error was so fundamental as to deny them a fair trial. But if it is now perceived that the error was so fundamental, it could have been perceived prior to trial. As this Court noted in **Wainwright**, if a defendant believes that an action of a trial court is about to deprive him of a constitutional right, it is incumbent on that defendant to raise it.

Similarly, the argument that if the issue had been raised at trial or on appeal, it would not have been successful is strategic explanation, not justification. Bell and Hughes demonstrate this point well. Bell asserts at page 53 of his brief in support of an argument for

objective practical futility that four Ohio Appellate Courts had decided the issue adversely to the later decision in **Robinson,** *supra* and at page 52 that there are seven documented cases in which an objection was overruled. Hughes goes even further and at pages 18-20 of his brief argues "actual" futility by intermediate appellate decisions controlling his case. Aside from showing however that the issue was being raised by other counsel (despite earlier assertions that it was impossible to conceive the issue) it underscores the fact that ultimate success is not always achieved at the trial court level or even initial appeals. Whether the issue is deemed important enough to pursue to completion in the face of adverse authority is part of the strategic calculus.

An example is **Hawk v. Berkemer,** 610 F.2d 445 (6th Cir. 1979). There the State of Ohio successfully challenged two prior adverse Sixth Circuit precedents on exactly the same point. Had that Court not been persuaded to change its earlier views, certiorari would certainly have been available to further contest the issue. The Court may of course, take judicial notice of decisions in which the Court ultimately reversed a prior precedent. Moreover, assuming that Hughes and Bell had researched the issue and were actually aware of the unreported decisions that they now rely on as having deterred raising the issue, it is then possible that they might also have become aware of the appellate court opinion in **State v. Robinson,** 48 Ohio App. 2d 197 (CA Franklin 1975) and the earlier December 24, 1974 opinion in **State v. Mathews,** No. 74 AP 428. See 48 Ohio App. 2d *supra* at 200. At that time, Bell and Hughes could have requested certification of the issue to the Ohio Supreme Court based upon conflict in appellate decisions.

It is of course impossible to know at this time whether Bell and Hughes were actually aware of these unreported decisions at the time of their trial and were thus "deterred". Neither made an objection at trial and

neither raised the issue on appeal. While acknowledging that the objection he made seemed to go to different issues Hughes does argue his counsel made an objection to the "entire charge". Whether Ohio would have recognized such a non-specific objection however is impossible to say as the "issue" was not pursued on appeal. **United States v. LeBlanc**, 612 F. 2d 1012 (6th Cir. 1980). Moreover, even if the objection were not specific enough, Hughes then argues that the failure to make a specific objection shows a lack of deliberate "sandbagging". But the term, as used in **Wainwright**, *supra* does not necessarily imply gamemanship. **Washington v. Estelle**, 648 F. 2d 276 (5th Cir. 1981). Hughes certainly wishes now to take advantage of an issue he neither raised nor helped decide.

A central theme to the argument on futility is that the State has no legitimate interest in preventing resolution of these cases if the objection was not easily made. But finality in the law is an interest which is both viable and necessary. **Federated Dept. Stores, Inc. v. Moitie**, _____U.S._____101 S. Ct. 2424 (1981). If the objection had been made, the trial court may have perceived the issue. If the issue had been raised on appeal, the appellate court like **Robinson** might have reversed. If the issue had been prosecuted to the Ohio Supreme Court, the pertinent case may have been, not **Robinson**, but Bell, Hughes, or Isaac. While Bell appears to argue that instructions are somehow different than other issues at trial, they, no less than other issues, serve to focus the efforts of the parties upon the main event in the criminal law process - the trial.

That no middle ground exists under respondents' theory is seen from the alternative argument that their failure to raise the issue is ineffectiveness of counsel. Respondents assert that if their counsel had a duty to anticipate the issue, then the failure to so anticipate is ineffectiveness, per se. Such a view requires the criminal justice system to insure that all counsel are equal. A

defendant is entitled to competent counsel - not perfect counsel. The issue before the court is whether competent counsel can bind their client to less than perfection.

B. RETROACTIVITY AND EQUAL PROTECTION

The amicus brief of the Institutional Legal Services Project (State of Washington) seeks to assert that the State's interest in finality is subsumed in the determination of retroactivity. Even accepting that formulation of the problem however, no additional benefit is conferred on respondents. Ohio, in determining the retroactivity of its state created decision, balanced the interests such that the decision in **Robinson** was retroactive to those who objected. Unless equal protection is implicated, the amicus argument fails in its initial premise. In terms of equal protection, what Ohio did was clearly premised on the guidance by this Court in **Hankerson v. North Carolina,** 432 U.S. 233 (1977).

A separate equal protection argument is raised by Isaac. Isaac asserts that Ohio Cr. R. 30 denies equal protection in that it applies only to jury trials. **State v. Humphries,** 51 Ohio St. 2d 95 (1977). The issue was never raised in any court below. Moreover, there is nothing irrational about drawing a distinction between a self instructed trier of fact who is presumed to know the law and a jury which must be instructed as to controlling principles.

A final equal protection argument is raised by Bell. At pages 46-49, Bell argues based on unreported state cases decided prior to **State v. Long,** 53 Ohio St. 2d 91 (1978) that the determination of whether **Robinson** is plain error has been decided by the Ohio Courts in an arbitrary and capricious manner. Equal protection how-

ever does not guarantee uniformity of judicial decisions. **Beck v. Washington,** 368 U.S. 651 (1962). This is especially true in the absence of an authoritative construction by the State's highest court. Moreover, it should be noted that **State v. Long,** *supra* did not foreclose that plain error might be shown. Rather, it simply held that plain error is not established simply by citation to **Robinson.**

C. PLAIN ERROR – ADEQUATE STATE GROUNDS

A third argument common to respondents is that **Wainwright** should not apply to "plain error". Although not relied on by the Appellate Court below, this was the initial response of such court to waiver questions. **Berrier v. Egeler,** 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 955. The argument proposes that because a state has a plain error review mechanism of its own that it has waived any legitimate interest that it has to enforcement of its contemporaneous objection rule. Such an approach creates the novel proposition that in order to invoke the interests of its contemporareous objection rule, the State would have to eliminate its plain error review muchanism. This is hardly likely to make the state courts more receptive to being a co-equal court with the federal courts in responding to claims of constitutional deprivation. Having recognized the validity of contemporaneous objection rules in **Wainwright,** it would appear anomalous that such rules are so fragile. In **Hockenbury v. Sowders,** 620 F. 2d 111, 114 (6th Cir. 1980), Judge Kennedy, writing for the Court stated:

> **Wainwright** makes it clear that the role of the federal courts in preventing manifest injustice in these cases is maintained through the application of the "cause"

> and "prejudice" exception to the finality of state procedural rules, rather than an independent application of those rules.

See also: **Wainwright,** *supra,* at 90-91.[1] The notion of "independent" plain error gives no deference to comity or the state's interest in finality. *See;* **Ratcliff v. Estelle,** 597 F. 2d 474 (4th Cir. 1979).

To be sure, the Court might find an asserted independent state ground to be inadequate. **Henry v. Mississippi,** 379 U.S. 443 (1965). But if an independent state ground is found to be adequate, it should not be subject to a non-definable plain error rule above and beyond "cause and prejudice". Moreover, the contemporaneous objection rule involved herein meets the traditional tests of an adequate state ground. **Wainwright,** *supra.* While amicus, the Ohio Criminal Defense Lawyers Association asserts use of the contemporaneous objection rule is a device to avoid consideration of a federal right, that merely states the obvious with respect to all preclusive procedural devices. Balancing the interests of the State in the finality of their criminal convictions - in these cases - mostly homicides, Ohio has not created an impermissible artifice to defendants seeking the benefits of the state created **Robinson** decision.

D. WAIVER OF WAIVER

Bell asserts two arguments, not raised previously in opposition to certiorari being granted, that petitioners have waived the waiver argument in his case. Aside from the fact that neither argument is applicable to Isaac,

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1. Despite the above resolution, it appears that at least some members of the appellate court below still adhere to a contrary view. *See:* **Hockenbury v. Sowders,** 633 F. 2d 443 (6th Cir. 1980); **Murray v. Superintendent,** 651 F. 2d 541 (6th Cir. 1981).

Hughes or the numerous other decisions pending in the federal courts in Ohio awaiting resolution of these cases, neither argument has merit.

The first argument is that petitioners did not raise the waiver issue with respect to Bell's case in the district court. Whatever the merit to this contention, it is clear that it was not the basis for decision by the appellate court in **Bell v. Perini**, 635 F. 2d 575 (6th Cir. 1980). Instead, that Court ruled:

> We believe that Bell, in the instant case, has likewise shown "cause" and "prejudice" as is required by **Wainwright** for the reasons stated in the plurality opinion in **Isaac.**

Supra at 578. Moreover Judge Merritt specifically dissented on the basis that Ohio's contemporaneous objection rule provided an independent state ground. Having actually ruled on the waiver question, the decision of the Court of Appeals is ripe for review. **City of Newport v. Fact Concerts, Inc.**, _____U.S._____, 101 S. Ct. 2748 (1981).

The second objection, never raised in any court below is that the failure of the State to submit the transcript of Bell's trial to the district court eliminates any factual predicate from the record that Bell did not object. What respondent does not assert however is that Bell did in fact object. If Bell is now contesting his prior acquiescence in the statement that Bell did not object, it is an assertion which can be readily verified.

E. STATE LAW ERROR – CONSTITUTIONAL ERROR

The clearest dispute between the parties on the merits is evidenced by Bell's brief. At page 4, Bell states:

> . . .United States Court of Appeals for the Sixth Circuit determined that it was error to place the burden of proof upon the accused to prove that they had acted in self defense. Petitioners do not deny that such an error occurred.

Petitioners do not deny that an error occurred pursuant to the state created decision in **State v. Robinson,** *supra.* Petitioners do deny and vehemently contest that an error of consitutional law occurred. This case is simply not **Mullaney v. Wilbur,** *supra.* In **Mullaney,** the state law as applied was found to unconstitutionally shift the burden of proof. In these cases, the State Courts, by misapplying state law which had yet to be construed, gave the lesser of two equally constitutional instructions. It is in apparent recognition of this destinction that Bell attempts to persuade the Court that the instruction actually given is itself unconstitutional.

Bell's argument on this point has two major components. The first is that it is inherently and fundamentally unfair to place the burden of proof of the confession and avoidance doctrine of self defense on the defendant. To this extent, Bell's argument implicates the inherent power of a State to define the essential elements of the crime. **Patterson v. New York,** 432 U.S. 197 (1977). However, the Sixth Circuit's precedents are of no aid to Bell on this point. In **Carter v. Jago,** 637 F. 2d 449 (6th Cir. 1980), (petition for rehearing en banc pending) the Court rejected the contention that is beyond the power of a legislature to determine that the person in the best position to know the facts of the

defense could be required to carry a "preponderance" burden as to it. See also: **McElroy v. Holloway,** _____ U.S._____, 69 L. Ed. 2d 398 (1981), Rehnquist, J. and Burger, C.J., dissenting. It may be that the doctrine of self defense springs from constitutional bases itself. But making the determination that a state must provide a defense of self defense says nothing as to how it must be defined or who has the burden with respect to it.

The second argument is that self defense negates other unspoken elements of crimes in Ohio, thus requiring the State to disprove the existence of the defense. In reality, however, this argument posits that there never have been, are not, and could not be any affirmative defenses in Ohio. This is particularly novel in light of the holding in **Robinson** itself that self defense was not in issue unless the defendant raised it.

The central premise of this argument is that since self defense results in a finding of "not guilty" it must contradict an element. As suggested "elements", Bell proposes the "requirement of criminal conduct", the "requirement of criminal intent", the "requirement of a voluntary act", the "allegation of unlawfulness" and the "allegation of against the peace and dignity of the State". The failure of Bell to even cite to **State v. Poole,** 33 Ohio St. 2d 18 (1973) establishes that the argument is not founded on the authoritative construction of Ohio law on affirmative defenses. Therein, the Ohio Supreme Court stated at page 19:

> This Court has consistently recognized that there are certain "justification(s) for admitted conduct" allowed to a defendant in a criminal case, *provable for the most part under the plea of not guilty,* which are referred to as "affirmative defenses".

(emphasis added). Under **Poole**, Ohio could require a jury to state its verdict as not guilty or "not punishable by reason of self defense". That Ohio has chosen a different form does not control the substance of what occurs.

A comparison of Bell's argument to the historically recognized affirmative defense of insanity establishes that Bell is arguing for elimination of all affirmative defenses. While insanity is called a defense of excuse and self defense, a defense of justification, each is premised on the notion that a person who has done an act with the requisite intent required by law should not be punished. Under Bell's theory, insanity would also violate "criminal conduct", "criminal intent", "voluntary act", "unlawfulness", and "peace and dignity". A more accurate statement of Ohio law is that otherwise criminal conduct is not punished.

Bell's third argument is that relied on by the appellate court below - once Ohio enacted O.R.C. section 2901.05 it created "absence of self defense" as a functional element of the crime rather than merely altering the quantum of proof required for an affirmative defense. While Bell appears to rely on unreported state appellate decisions, petitioners would prefer the authoritative constructions of Ohio law of the Ohio Supreme Court. Bell dismisses the impact of **State v. Abner**, 55 Ohio St. 2d 251 (1978) and the refusal of the Court therein to require a specific instruction on the duty of the State to disprove self defense by making the bald statement that since absence of self defense is an element under **Robinson**, that **Abner**, is probably unconstitutional as well. Bell, brief page 18. Moreover if there was ever any doubt that self defense remained an affirmative defense after **Robinson**, **State v. Jones**, 67 Ohio St. 2d 244, 249 n. 1 (1981) settles that question:

> This Court has held that the defenses of insanity, intoxication, and self defense are affirmative defenses. **State v. Robinson,** (1976), 47 Ohio St. 2d 103, 108.

Petitioners' principal problem with the analysis utilized by the appellate court is that it draws no distinction between what errors of state law are matters of state concern and what are federal constitutional questions. The premise appears to be that **Robinson** created a protected interest which it is somehow the federal courts duty to enforce. But if **Robinson** was itself not constitutionally required, how does the appellate court distinquish between the interest created by any other state statute, evidentiary principle, or rule of procedure. Under the appellate court analysis every question of error of state law becomes a federal habeas corpus concern. While not previously articulated in this fashion, this Court has consistently held that the process which is due for errors of state law is appellate review in the state courts. **Wainwright v. Stone,** 414 U.S. 21 (1973). Unless federal habeas corpus courts are to be super appellate courts for the states, such distinction must be renewed.

CONCLUSION

The decisions of the Courts below are erroneous as to both the "cause" and "prejudice" components of **Wainwright v. Sykes,** *supra.* As such, a reversal in each case is required.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record for Petitioners

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of Petitioners has been served on respondents by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main St., Circleville, Ohio 43113, counsel for Isaac; and Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell and Hughes, by U.S. Mail, postage paid, this _____ day of September, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 44113; Kenneth Bell, No. 141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley surles, 163 Rhodes Avenue, Akron, Ohio 44302.

SIMON B. KARAS
Counsel of Record